Equality Bodies and Freedom of Movement

An Equinet Discussion Paper

Equinet Working Group on Equality Law

2015

Equinet
European network
of equality bodies

Equality Bodies and Freedom of Movement is published by Equinet, the European Network of Equality Bodies.

Equinet brings together 45 organisations from 33 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

Equinet members: Commissioner for the Protection from Discrimination, **Albania** | Austrian Disability Ombudsman, **Austria** | Ombud for Equal Treatment, **Austria** | Interfederal Centre for Equal Opportunities, **Belgium** | Institute for Equality between Women and Men, **Belgium** | Commission for Protection against Discrimination, **Bulgaria** | Office of the Ombudsman, **Croatia** | Ombudsperson for Gender Equality, **Croatia** | Ombudswoman for Persons with Disabilities, **Croatia** | Office of the Commissioner for Administration and Human Rights (Ombudsman), **Cyprus** | Public Defender of Rights – Ombudsman, **Czech Republic** | Board of Equal Treatment, **Denmark** | Danish Institute for Human Rights, **Denmark** | Gender Equality and Equal Treatment Commissioner, **Estonia** | Ombudsman for Equality, **Finland** | Non-Discrimination Ombudsman, **Finland** | Commission for Protection against Discrimination, **Former Yugoslav Republic of Macedonia (FYROM)** | Defender of Rights, **France** | Federal Anti-Discrimination Agency, **Germany** | Greek Ombudsman, **Greece** | Equal Treatment Authority, **Hungary** | Office of the Commissioner for Fundamental Rights, **Hungary** | Irish Human Rights and Equality Commission, **Ireland** | National Office Against Racial Discrimination, **Italy** | National Equality Councillor, **Italy** | Office of the Ombudsman, **Latvia** | Office of the Equal Opportunities Ombudsperson, **Lithuania** | Centre for Equal Treatment, **Luxembourg** | National Commission for the Promotion of Equality, **Malta** | National Commission for Persons with Disability, **Malta** | The Protector of Human Rights and Freedoms (Ombudsman), **Montenegro** | Netherlands Institute for Human Rights, **Netherlands** | Equality and Anti-Discrimination Ombud, **Norway** | Commissioner for Human Rights, **Poland** | Commission for Citizenship and Gender Equality, **Portugal** | Commission for Equality in Labour and Employment, **Portugal** | High Commission for Migration, **Portugal** | National Council for Combating Discrimination, **Romania** | Commissioner for Protection of Equality, **Serbia** | National Centre for Human Rights, **Slovakia** | Advocate of the Principle of Equality, **Slovenia** | Council for the Elimination of Ethnic or Racial Discrimination, **Spain** | Equality Ombudsman, **Sweden** | Equality and Human Rights Commission, **UK – Great Britain** | Equality Commission for Northern Ireland, **UK – Northern Ireland**

Equinet Secretariat | Rue Royale 138 | 1000 Brussels | Belgium
info@equineteurope.org | www.equineteurope.org
ISBN 978-92-95067-93-6

This is a publication of Equinet's Equality Law Working Group, prepared based on the information, contributions and comments provided by members of the Working Group The views expressed in it belong to the authors and neither Equinet nor the European Commission are liable for any use that may be made of the information contained therein. This information does not necessarily reflect the position or opinion of the European Commission.

Acknowledgements

Publication Coordination:
Jayne Hardwick, Equality Commission and Human Rights Commission
Tamás Kádár and Moana Genevey, Equinet Secretariat

Editing:
Sarah Cooke O'Dowd, Equinet Secretariat

Equinet
European network
of equality bodies

Co-funded by the Rights, Equality and Citizenship Programme of the European Union

Table of Contents

Introduction

Equality bodies have been set up in all EU Member States and beyond on the basis of EU equal treatment legislation, in particular Directive 2000/43/EC (Race Directive), Directive 2004/113/EC (Gender Goods and Services Directive), and Directive 2006/54/EC (Gender Recast Directive). These Directives cover the grounds of gender, race and ethnic origin in matters of employment and beyond. However, neither these, nor any of the other equal treatment directives cover the ground of nationality, and the Race Directive stipulates specifically in its Recital 13 and Article 3(2) that 'This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality…'. Therefore, the sources of EU secondary law most immediately affecting the work of equality bodies do not cover discrimination on the ground of nationality.

In contrast, EU Treaties and secondary legislation in the field of free movement prohibit nationality-based discrimination, with Article 18 of the Treaty on the Functioning of the European Union (TFEU) and Article 21 of the Charter of Fundamental Rights of the EU (Charter) containing a general non-discrimination provision on this ground within the scope of application of the Treaties.

Article 45 of the TFEU stipulates free movement of workers and requires the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The EU has adopted a number of secondary laws in the field of free movement to detail some of these rules. The following sets of rules are of particular interest:

- Regulation (EU) 492/2011 of 5 April 2011 on freedom of movement for workers within the Union,
- Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,
- Directives 98/49/EC and 2014/50/EU regarding pension rights, and
- Regulations 883/2004 and 987/2009 regarding the coordination of social security systems.

In 2014 the EU adopted new legislation, Directive 2014/54/EU, aimed at facilitating the uniform application and enforcement in practice of the already existing rights conferred on workers by Article 45 TFEU and by Regulation (EU) 492/2011 in the context of freedom of movement for workers. Thus, the scope of this Directive is identical to that of Regulation (EU) 492/2011 and it applies to Union workers and members of their families.

As the Explanatory Memorandum of the Commission's proposal for the Directive points out, in spite of EU legislation in place, EU citizens who want to move or who actually move from one Member State to another for work purposes continue to face problems in exercising their rights. This also explains partly why geographical mobility between EU Member States has remained at a relatively low level. The problems listed in the explanatory memorandum include: public authorities not complying with EU law (non-conforming legislation or incorrect application); employers and legal advisors not complying with EU law; EU migrant workers not having access to information or the means to ensure their rights.

In order to tackle these problems the following specific objectives have been identified by the European Commission:

- lessening discrimination against EU migrant workers on the grounds of nationality;
- closing the gap between EU migrant workers' rights on paper and their exercise in practice by facilitating the correct implementation of existing legislation;
- reducing the incidence of unfair practices against EU migrant workers; and
- empowering EU migrant workers to ensure their rights are respected.

According to the Explanatory Memorandum, '*the Impact Assessment demonstrated that a binding legislative initiative would impact tangibly on the exercise of free movement rights. A binding legal instrument imposing obligations on Member States to adopt appropriate measures to ensure that there are effective mechanisms for the dissemination of information and advice to citizens is an effective and efficient way of achieving the stated objectives. The preferred option is a Directive combined with other initiatives, such as common guidelines on specific subjects to be adopted by the Technical Committee on free movement of workers*'.

The scope of the Directive, adopted on 16 April 2014, covers the following matters in the area of free movement of workers:

a. access to employment;
b. conditions of employment and work, in particular as regards remuneration, dismissal, health and safety at work, and, if Union workers become unemployed, reinstatement or re-employment;
c. access to social and tax advantages;
d. membership of trade unions and eligibility for workers' representative bodies;
e. access to training;
f. access to housing;
g. access to education, apprenticeship and vocational training for the children of Union workers;
h. assistance afforded by the employment offices.

Article 4 of the Directive foresees the setting up of bodies to promote equal treatment and to support Union workers and members of their family. The regulatory approach and wording of this Article is similar to the wording found in the EU Equal Treatment Directives as illustrated by the table below, comparing its text with the Recast Directive, where only a few important differences are apparent.

Gender Recast Directive (2006/54/EC)	**Directive 2014/54/EU**
Art. 20(1) Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals'	Art. 4(1) Each Member State shall designate one or more structures or bodies ('bodies') for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality, unjustified restrictions or obstacles to their right to free movement and shall make the necessary arrangements for the proper functioning of such bodies. Those bodies

rights.	may form part of existing bodies at national level which have similar objectives.
Art. 20(2)(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;	Art. 4(2)(a) providing or ensuring the provision of independent legal and/or other assistance to Union workers and members of their family, without prejudice to their rights, and to the rights of associations, organisations and other legal entities referred to in Article 3
Art. 20(2)(b) conducting independent surveys concerning discrimination;	Art. 4(2)(c) conducting or commissioning independent surveys and analyses concerning unjustified restrictions and obstacles to the right to free movement, or discrimination on grounds of nationality, of Union workers and members of their family
Art. 20(2)(c) publishing independent reports and making recommendations on any issue relating to such discrimination	Art. 4(2)(d) ensuring the publication of independent reports and making recommendations on any issue relating to such restrictions and obstacles or discrimination
Art. 20(2)(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality	Art. 4(4) Member States shall ensure that existing or newly created bodies are aware of, and are able to make use of, and cooperate with, the existing information and assistance services at Union level, such as Your Europe, SOLVIT, EURES, Enterprise Europe Network and the Points of Single Contact
	Art. 4(2)(b) acting as a contact point vis-à-vis equivalent contact points in other Member States in order to cooperate and share relevant information
	Art. 4(2)(e) publishing relevant information on the application at national level of Union rules on free movement of workers

Recital 18 of the Directive as well as the detailed explanation in the Explanatory Memorandum regarding this article stipulates specifically that it is up to each Member State to decide whether they would like to set up a new body or allocate the functions to an existing structure. The Explanatory Memorandum goes further and suggests that '*Building on existing structures has the advantage of benefiting of the existing knowledge and experience. It also increases simplicity and accessibility since it avoids the risk of creating confusion and uncertainty as to where to turn in case of problems*'. Furthermore, '*at present 'nationality' could be covered by the competence of existing Equality bodies in 19 Member States*'.

Having realised the possible relevance of this new Directive for Equality Bodies, Equinet has surveyed its membership in July—August 2014 and repeated the survey in April 2015 to find out more about the position, expectations, capacities and possible reservations of equality bodies with regard to this Directive.

The survey, answered by 32 equality bodies from a membership of 42 equality bodies[1], revealed that by April 2015 three equality bodies were already designated as Article 4 bodies under the Directive (even though the implementation deadline for the Directive is only 21 May 2016). Nine more equality bodies reported that they are likely to be designated as bodies under the Directive.

The survey served as a basis for discussions in the Equinet Working Group on Equality Law, bringing together legal experts of equality bodies from all over Europe.

Importantly, 19 equality bodies out of 32 reported that their mandate could already cover discrimination on the basis of nationality and/or citizenship. For some, this is listed in legislation as a separate ground, while others would understood them as part of other grounds, typically race and ethnicity. The large number of our members already dealing with nationality-based discrimination is also reflected in the significant case law from equality bodies that Equinet could collect and that is compiled at the end of this discussion paper.

While a number of equality bodies stated that they see being appointed under the Directive as a great opportunity for increasing their reputation, prestige and visibility, the survey answers and legal experts of the Working Group Equality Law also pointed to important questions and concerns in relation to the requirements towards Article 4 bodies. These could be critical in case equality bodies are designated as such bodies. Some of these concerns are listed in the following chapter.

[1] Since the Equinet Annual General Meeting in October 2015, the membership consists of 45 equality bodies across 33 countries.

1. Key Challenges Identified by Equality Bodies

1) Practical implications of the impending implementation of the Directive - a strong need for additional resources, mandate, powers and expertise

As of 28 September 2015, 11 out of 17 national equality bodies did not know if they were going to be the designated body under the Freedom of Movement Directive. Three thought they were and two thought they were not going to be designated. The Directive is due to be implemented by 21 May 2016 and time is running short for the equality bodies to make practical arrangements required if they are to be the designated body.

The mandate of some equality bodies would have to be extended, should they be designated, to cover the ground of nationality, or enhance their capacities to provide legal assistance for Union workers and their families. These changes require the allocation of additional resources (by increasing financial and staff support) but also additional staff training and the extension of existing expertise – notably with the recruitment of legal experts.

2) What 'legal and/or other assistance' should be provided to Union workers and their family and what is expected exactly from equality bodies?

Recital 17: '*The competence of those bodies should include, inter alia, the provision to Union workers and members of their family of independent legal and/or other assistance,* ***such as the provision of legal advice*** *on the application to them of the relevant Union and national rules on free movement of workers, of information about complaint procedures, and of help to protect the rights of workers and members of their family. It may also include assistance in legal proceedings'*

Article 4(2)a: '*providing or ensuring the provision of independent legal and/or other assistance to Union workers and members of their family, without prejudice to their rights, and to the rights of associations, organisations and other legal entities referred to in Article 3*'

Many equality bodies raised concerns about the scope of the 'legal advice' and 'legal and/or other assistance' which they may potentially be requested to provide for EU workers and their families. From the Recital, it appears that the designated bodies will have competence to provide assistance, including legal advice, on the application of rules on freedom of movement, complaints procedures, assistance available, including assistance in legal proceedings. This goes significantly further than what the EU Equal Treatment Directives provide (offering assistance to the victims of discrimination) and it appears to require a 'helpdesk' or legal advice bureau function, which is currently not assigned to some or most equality bodies.

The Commission's original proposal for the Directive used a different wording which is narrower and closer to that of the EU Equal Treatment Directive: *'…the provision of independent legal and/or other assistance to workers or the members of their family in pursuing their complaints'.*

The substantive scope of the Directive extends to areas not covered by the existing mandates of equality bodies. Article 2 explains that the Directive encompasses:

- Access to employment
- Conditions of employment and work, including remuneration, dismissal, health and safety at work, re-instatement and re-employment

- Access to social and tax advantages
- Membership of trade unions/workers' representative bodies
- Access to training and housing
- Access to education, apprenticeship and vocational training for the children of Union workers
- Assistance given by employment offices

It is not specified what is the scope of the legal advice equality bodies are expected to provide and in particular if this advice should encompass all aspects of Article 2. This appears to be at the discretion of Member States. If equality bodies are required to provide assistance in relation to EU and national rules on freedom of movement in addition to nationality discrimination, they would require significantly more resources/expert staff.

3) Scope

As set out above, the scope of the Directive (and therefore the scope of the duties of designated bodies under its Article 4) covers nationality-based discrimination against EU workers and their families in employment, social and tax advantages, membership of trade unions, access to training, housing, education and assistance afforded by the employment offices.

However, the group is aware that nationality-based discrimination occurs beyond these fields. In some Member States, nationality-based discrimination is explicitly prohibited in, for example, goods, services and facilities under domestic law and the equality bodies have responsibility for dealing with such cases already. In other States there is no such prohibition and claims are dealt with under provisions relating to race or ethnic origin discrimination.

This is likely to lead to some confusion for EU workers and their families when they are seeking advice in relation to claims which fall outside the scope of this Directive, and therefore outside of the requirement on designated bodies to provide advice etc. and there may not be a clear remedy.

4) Member States can require equality bodies to provide assistance in legal proceedings and charge clients for it, except for those who lack sufficient resources.

Article 4(2): *'…where bodies provide assistance in legal proceedings, such assistance shall be free of charge to persons who lack sufficient resources, in accordance with national law or practice'*

Equality bodies do not currently charge for providing assistance in legal proceedings. If Member States decide to require them to charge those who can afford to pay, the nature of these bodies would be changed, as the Directive seems to foresee structures that are meant to be servicing platforms giving legal assistance. If they are required to charge for assistance, the public status of equality bodies as non-profit and independent institutions could be endangered and the original model of financing of equality bodies may be deeply challenged.

5) The apparent requirement to provide legal assistance to everyone is in opposition with the current way of working of some equality bodies, which strategically select the cases they support.

It appears that the Directive could deprive equality bodies of the opportunity to strategically select cases which fall under the Directive. Some equality bodies currently decide which cases to support before courts by taking into account many criteria such as the significance of the violated right or wider social consequences arising from the alleged violation. If they had to support all cases brought to them under the Freedom of Movement Directive, it would considerably minimize the significance of strategic litigation in that area. Indeed, this strategic selection of cases is both necessary due to the lack of financial and human resources, but also because the equality bodies' inherent function may be focused on a more structural way of fighting discrimination, and not on taking up every case.

6) The Directive could create conflict of interests, as some equality bodies might be required to provide advice and information and later decide on the same case.

The requirement to provide advice to individuals under the Freedom of Movement Directive will need to be handled particularly carefully by equality bodies that have a quasi-judicial role. Such bodies are empowered to provide Opinions on discrimination complaints brought to them. This necessitates them maintaining independence and impartiality from the parties in each case. It will require careful management of any advice service under the Freedom of Movement Directive to ensure that the equality bodies' independence and impartiality is not threatened.

Several members of the Equinet Legal Working Group reported that their equality bodies already successfully manage this tension by simply providing information to claimants on their rights and then dealing with any subsequent complaints impartially.

7) To whom should the 'relevant information' on the application of the Directive at the national level be addressed?

Article *4(2): Member States shall ensure that the competences of those bodies include:*
(e) publishing relevant information on the application at national level of Union rules on free movement of workers.

The wording of this provision does not specify what information would need to be published and who should receive it. The purpose of this information could either be raising public awareness or informing other relevant bodies (at national and/or EU level) of the situation in each Member State. As the information could be targeted at very different audiences, the content could also be very different. Clarification is needed here.

Also, it is not clear how this requirement relates to Article 6, read with Recital 23, which provides that Member States shall ensure that the provisions adopted pursuant to the Freedom of Movement Directive and Articles 1 - 10 of Regulation 492/2011 are brought to the attention of interested parties.

8) What are the legal implications for same-sex families under the Directive?

Article 2 (2) Directive 2004/38/*EC* *"Family member" means:*

(a) the spouse;

*(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State**, if the legislation of the host Member State treats registered partnerships as equivalent to marriage** and **in accordance with the conditions laid down in the relevant legislation of the host Member State**'*

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

This issue does not only impact on the work of equality bodies, but is rather a general legal challenge regarding the Directive. The definition of 'family and family members' relied on by the Directive means that the legal recognition of a same-sex couple or a same-sex family would solely depend on the current legislation of the host Member State. This creates legal uncertainty and a situation in which the freedom of movement of same-sex couples is restricted and their legal unions are not recognised throughout the EU. An important consequence for the purposes of this discussion paper is that if the host Member State does not acknowledge same-sex marriage or adoption, the family members of a Union worker will not be able to benefit from the help and support of bodies designated under Article 4, as they will not be legally recognised as the family of the worker.

According to the EU Agency for Fundamental Rights (FRA)[2], Article 6(2) of the EU Treaty[3] means that Member States must comply with fundamental rights, including the prohibition on sexual orientation discrimination when they are applying EU law. Although the Freedom of Movement Directive does not require Member States to allow same-sex partnerships or marriages, it does oblige Member States to treat same-sex couples equally to opposite sex couples when they are applying EU law (including the law relating to free movement). To do otherwise would constitute discrimination on the ground of sexual orientation.

The Working Group notes that this point was highlighted by an amendment which was made to Recital 13 which provides: 'Enforcement of that fundamental freedom [of movement] should take into consideration the principle of equality between women and men and the prohibition of discrimination of Union workers and members of their family on any ground set out in Article 21 of the Charter of Fundamental Rights of the European Union', which includes sexual orientation.

The Equinet Legal Working Group finds that it would be helpful if guidance could be provided on Member States' obligations under EU law to same-sex couples seeking to exercise their right of freedom of movement in another Member State.

[2] Homophobia and discrimination on grounds of sexual orientation in the EU Member States Part 1 - legal analysis, June 2008 (http://fra.europa.eu/sites/default/files/fra_uploads/192-FRA_hdgso_report_Part%201_en.pdf) and Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity – 2010 Update Comparative legal analysis, November 2010 (http://fra.europa.eu/sites/default/files/fra_uploads/1759-FRA-2011-Homophobia-Update-Report_EN.pdf)

[3] 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

9) There is a risk of under-reporting from migrant workers.

Equality bodies are not necessarily the first type of structure that migrant workers usually address when they need information, advice or when they seek to file complaints – even when the mandate of some equality bodies covers discrimination on the basis of nationality. This is also reflected in the relatively low number of cases received by equality bodies already holding a mandate on this ground. The challenge would be to find the best strategy to efficiently reach this group and appear as a helpful institution for them.

2. Case work by Equality Bodies on nationality-based discrimination

This chapter contains some selected examples where equality bodies dealt with cases of discrimination on the basis of nationality which fall within the scope of the Directive. We have also listed some cases submitted by Working Group members which fall outside the scope of the Freedom of Movement Directive, but which would nevertheless be covered by domestic law in some Member States, to illustrate where there may be gaps in protection for EU workers and their families not provided for by this Directive.

Belgium

Limited access to functions within public services

For certain functions within the public services, the criterion "in possession of the Belgian nationality" is used as a selection criterion. This criterion is, in some cases, prescribed by law. The access to certain positions within the public services can be reserved to Member States' own nationals. It concerns more precisely positions that involve a direct or indirect participation in the exercise of the powers that are conferred by public law and the duties designed to safeguard the general interest of the State or other public authorities. However, the Belgian equality body reported that in practice the selection criterion is interpreted too broadly.

Czech Republic

Discriminatory student fares for public transportation

Mrs. M., a citizen of the Slovak Republic, turned to the Office of the Public Defender of Rights with a complaint against a price assessment of the Ministry of Finance according to which only students with a permanent residence in the Czech Republic are entitled to student fares in railway and bus transportation. The Defender came to the conclusion that the price assessment introducing the requirement of permanent residence in the Czech Republic for the purposes of student fare admission is discriminatory on the ground of citizenship. Therefore it is against EU law. The Defender recommended changing the price assessment. The Ministry of Finance subsequently issued a new price assessment according to which the entitlement to student fares is not bound to permanent residence in the Czech Republic. Since 1 January 2012, all pupils and students are entitled to student fares on a route from their place of residence to school.

Discriminatory internship scheme

In 2012, a university student from the Slovak Republic, who had been studying in the Czech Republic, asked the Ombudsman for help in relation to a particular internship scheme. The internships were organised through the Education for Competitiveness Operational Programme, which is under the jurisdiction of the Ministry of Education. According to the requirements prescribed by the Operational Programme, the participants of the project had to be Czech citizens or permanent

residents. Therefore, these conditions ruled out most foreign students studying at Czech universities. The Ombudsman found these conditions discriminatory based on citizenship and nationality and consequently against EU law and the Anti-Discrimination Act. The Ministry of Education followed the conclusion of the Ombudsman and promised that future projects would not contain the discriminatory conditions.

France

Requirement that the successful candidate had to have French or German nationality in order to be appointed as Director or Deputy Director of a scientific research centre in Germany

A French/German scientific research centre based in Germany was hiring a Deputy Director. In the statutes of the centre, there was a requirement for the Director and its Deputy to be French or German, in order for them to have a German or French "scientific research culture". An unsuccessful candidate contacted the Defender of Rights and established that although not a French or German national, he had a proven and strong French "scientific research culture". The Defender of Rights was of the view that the situation described could constitute discrimination based on nationality because the requirement of being a French or a German citizen was not a "genuine and determining occupational requirement" and could be regarded as a disproportionate measure to achieve the goal of having a Director or a Deputy Director who had a French or a German "scientific research culture".

French nationality requirement to complete an internship as a student doctor in a military hospital

The Defender of Rights was approached by a claimant (an EU citizen) to declare that the procedure for choosing medicine interns organized by a Regional Directorate for Health and Social Affairs (RDHSA) was discriminatory because there was a requirement to be a French citizen in order to be able to work in a military hospital as an intern. The Defender's investigation showed that this requirement, which had no legal basis, was not objectively and reasonably justified and could be considered as discriminatory. Therefore, the Defender of Rights reminded the RDHSA of the applicable regulatory framework (no nationality requirement in order to work, as a student doctor, in a civilian or a military hospital). He also advised that restrictions relating to who could work in military hospitals cannot depend on their nationality or any other discriminatory criterion.

Germany

Refusal to rent a flat to non-German citizens

A landlord refused to rent his flat to non-German citizens. He argued that he had bad experiences with non-German citizens. They moved out very early without paying. The landlord was not able to get his money back because it was too expensive and too complicated to file a lawsuit abroad. The Federal Anti-Discrimination Agency (FADA) considered this case as a case of indirect discrimination on grounds of ethnic origin because difficulties enforcing the law abroad do not justify the exclusion of a prospective tenant.

Great Britain

In 2012 the Equality and Human Rights Commission (EHRC) published its' findings following a major investigation into employment practices in the meat and poultry processing industry[4] and concluded that:

- Non UK nationals alleged that recruitment agencies had rejected them on grounds of nationality.
- One third of recruitment agencies confirmed that they acted unlawfully in sometimes supplying workers by judging what nationality the processing firm would prefer, or responding to direct requests from employers.

Other Examples of discrimination and obstacles faced by migrant workers:

One voluntary sector organisation described a 'pervading culture of racial abuse' in some processing firms. And a number of interviewees saw the verbal abuse they received as racially motivated.

"This manager is coming and [shouting] 'you f***ing shit, you f***ing shit Polish'. They use the coarse [language] like this. We're cutting small pieces off the meat, and if it's some fat on this, managers come and swear [at] people."
(Polish female in meat processing factory, North West England)

Segregation by nationality

One of the challenges for processing firms is to manage a highly diverse workforce where many migrant workers have limited English skills. A key approach appears to be the segregation of shifts or production lines by nationality.

Interviewees said that managers preferred particular nationalities for certain shifts as they regarded these workers as 'more reliable' or 'hardworking'. Some firms attempted to manage communication challenges or to avoid tensions by segregating shifts so that all workers spoke the same language, and some supervisors refused to have certain nationalities working for them on grounds of race or colour.

Segregation on the grounds of nationality is unlawful discrimination in the UK and is damaging to integration and interaction between different nationalities both in and outside the workplace.

Insufficient support with language skills

Most workers told us their firm had not offered them support to learn English. Less than one-third of agencies offered advice on accessing English lessons. Many migrant workers found English lessons themselves as they saw this as the key to finding better work and being able to interact more effectively with British colleagues. Lack of fluency in English was consistently linked to poor treatment and inability to access information and complaints procedures.

[4] http://www.equalityhumanrights.com/sites/default/files/documents/Inquiries/meat_inquiry_report.pdf

Vulnerability to criminal exploitation

At its most extreme, a lack of knowledge of rights and barriers to complaining can lead to criminal exploitation of migrant workers. In one instance a criminal gang charged migrant agency workers £250 for a placement at a local poultry firm. Agency workers were then subjected to demands for increasing amounts of money and to severe beatings if they were not able to keep up with escalating payments.

Hundreds of workers were affected and suffered in silence. The police inspector who led this investigation said that similar exploitation of migrant agency workers had also been found in 12 other police forces across England and Wales.

Netherlands

Dutch national denied access to a Polish-speaking job[5]

Job Investment BV, an employment agency, posted a vacancy for a job as a welder. The vacancy specified that the job was to be performed in the Polish language. A Dutch national contacted the Job Investment BV to ask for information and to express his interest. The employment agency told him he would not be eligible for this job because he is not Polish. The Netherlands Institute for Human Rights (NIHR) finds this direct discrimination on the ground of nationality for which it is not possible to have any justification.

Northern Ireland

Employer failing to address case of harassment based on nationality

A care assistant from Czech Republic alleged that her colleague made racist comments to her. The Claimant alleged that her colleague reacted angrily to a new job opportunity offered to the Claimant, questioning the Claimant's ability to carry out such work, and threatening to make enquiries about it. She commented that it was unjust that people who 'belong here' cannot get jobs, while the Claimant had this opportunity. The Claimant found this very upsetting, as she was legally resident and felt that she did belong in Northern Ireland. The following day the Claimant reported this matter to the Human Resources Department. She complained that her employer had failed to address the issue adequately. The Claimant also complained that her work schedule was not altered, which meant that after making the complaint, she continued to work on the same shift as the alleged harasser who had supervisory responsibilities over the Claimant. The Claimant was very unhappy at the length of time the investigation took and her treatment during the investigation. Her employer eventually took disciplinary action against her colleague. On settlement of the case, the employer agreed to pay £ 10,000 to the Claimant and to liaise with the Equality Body to review its practices and procedures with regards to the prevention and investigation of harassment in the workplace.

[5] **Opinion 2014-80**

Discrimination and harassment on the workplace due to nationality

A Portuguese national was employed as an assembler from September 2005 until April 2008. The Claimant alleged that he was subjected to unlawful harassment by fellow employees. Examples of the alleged harassment were as follows:

- Other employees ignoring him
- Foul language being directed against him if he asked an employee to borrow tools
- Notes, mouthwash and toothpaste being left in his locker
- Mouthwash being left around his workbench
- A note to the effect that the Claimant would have to have separate transport to the Christmas meal
- A note left in his locker telling him to "go home"

The Claimant commenced sick leave as a result of the stress he was experiencing at work. He did not return to work. He alleged that he had previously reported incidents to a Manager but that he did not receive help and support. The Respondent agreed to pay the Claimant £7,500 and affirmed its commitment to equal opportunity at the workplace.

Discriminatory dismissal due to gender and nationality

A Romanian woman was employed in a coffee shop from September 2012 until the 5 August 2013 when she was dismissed. In April 2013 the Claimant had discovered that she was pregnant and she had told her manager, Ms O'Kane. In July 2013, the coffee shop changed owner after a transfer procedure. Ms O'Kane told the staff that none of them had a safe job anymore and that she was going to tell them the following week who was going to have a job under the new regime. On the 29 July 2013 Ms O'Kane told the Claimant that there was no point in her working there anymore because of the fact that she was pregnant and would only be able to work for another two months. The Claimant noted that only three of the staff were Romanian and that none of those three were offered employment under the new regime and that all of the rest of the staff were locals and that many of them had been offered employment by Ms O'Kane. The Claimant believed that she had been unfairly dismissed and suffered unlawful discrimination because of her pregnancy and race. The Tribunal found that the Claimant's dismissal was a sexually discriminatory dismissal in light of the remark which Ms O'Kane made to the Claimant about her pregnancy. The Tribunal also found that the Claimant's dismissal was discriminatory under the Race Relations Order. The Tribunal found that Ms O'Kane had failed to provide an adequate explanation of why more "local" staff who wanted a job under the new regime were offered a job and why the Claimant and the two other Romanian staff were not offered such a job either. The Claimant was awarded £ 13,456 in total.

Discriminatory selection criteria to the disadvantage of foreign nationals

The Claimant is a qualified accountant. He applied for the post of Project Accountant advertised by a public administration body in November 2004. His professional body is the Institute of Certified Public Accountants in Ireland.

One of the essential criteria for the post was membership of one of the four professional accountancy bodies which constitute the Consultative Committee of Accountancy Bodies in the United Kingdom. The advertisement identified the four bodies in question. The Institute of Certified Public Accountants in Ireland was not listed. The Claimant was not shortlisted and he contended that the criteria disproportionately disadvantaged Irish people and Catholics.

The Claimant produced a number of advertisements from public sector organisations where the essential criteria for accountancy positions expressly referred to the UK accountancy bodies and the Institute of Certified Public Accountants in Ireland. The Claimant's professional body is recognised as equivalent under the EU Directive on mutual recognition of professional qualifications.

On settlement of the case, the Respondent agreed to pay the Claimant £3000 and accepted that membership of the Institute of Certified Public Accountants in Ireland is equivalent to membership of the bodies affiliated to Consultative Committee of Accountancy Bodies in the United Kingdom. The Respondent also apologised for injury to feelings and distress and reaffirmed its commitment to equality of opportunity and ensuring that its policies, practices and procedures comply with the equality legislation. Further, the Respondent undertook to liaise with the equality body to review its policies, practices and procedures and to take steps to implement any reasonable recommendations.

Slovenia

Access to social benefits

In addition to the state run scheme for a similar benefit, some Slovenian municipalities decided to give families with new-borns residing in their area a special financial benefit (a single lump sum of financial assistance given to parents regardless of one's financial status). In contrast to the criteria of the state run scheme, some municipalities decided to include a requirement that the new-born and the parents should all have Slovenian nationality. The Advocate of the Principle of Equality issued an Opinion on the practice highlighting direct discrimination. The Advocate successfully requested the review of the nationality criterion and the individual claimant in question has successfully vindicated his right. Furthermore, the Advocate also warned the municipality in question on the possible (indirect) discriminatory effect on non-nationals of another criterion, namely that both the parents and the child were required to hold permanent residence status in Slovenia.

Examples of cases which fall outside the scope of the Directive, but which may be covered by domestic legislation in some Member States

Belgium

Sales tickets dance festival- indirect discrimination on the basis of nationality

A Belgian dance festival reserves 40% of its presale-tickets to Belgians. Customers with a Belgian bank account are given priority two weeks before the start of the official sales period.

Discrimination when refueling with a foreign license plate – indirect discrimination

The responsible of a gas station requires customers with a non-Belgian license plate (including European license plates) to deposit € 50, because “of his negative experiences with people with foreign license plates”.

Refusal to grant credit by a computer store

A computer store has a credit program which it applies in all its stores. They exclude all non-Belgian citizens from benefiting from the credit plans they offer i.e. purchasing items and paying in monthly installments.

Germany

Refusal to rent material to non-German citizens

FADA had a case regarding a builders’ merchant which refused to rent a chain saw to an Italian citizen. The business argued that the risk of damage is higher if the citizen is not German. If the non-German citizen lives abroad it would be much more difficult to file a lawsuit and to enforce the law. FADA came to the conclusion that it was a case of indirect discrimination on grounds of ethnic origin (as German anti-discrimination law does not cover the ground of nationality) because difficulties enforcing the law abroad do not justify discrimination on grounds of ethnic origin.

Slovenia

Refusal to grant credit / leasing to buy a car

A well-known car store and crediting /leasing company had a common credit program, but apparently their practice excluded non-Slovenian nationals from countries in the area of former Yugoslavia from benefiting the credit / leasing plans they offer “due to their negative experiences with this group of customers". The Advocate of the Principle of Equality assisted a Croatian national to successfully vindicate her rights more than a year after Croatia had acceded to the EU. Another similar case concerning another leasing house which excludes (all) non-Slovenian nationals is under investigation.

Registration of same-sex partners

According to national legislation, one of the conditions to register same-sex partnership status is that one of the partners in question has Slovenian nationality. Several couples of non-nationals residing in Slovenia were seeking advice on possibility entering same-sex partnership status. Although the Advocate of the Principle of Equality was not contacted directly, he nevertheless intervened and explained the legal situation to the persons affected. He noted that there is no reasonable explanation for this limitation and advised them in detail on necessary steps to open a case for a judicial review of this criteria. In the process of amending relevant legislation, the Advocate also proposed specific regulation, which would appropriately take into account same-sex status (registration, marriage) acquired in other EU Member States.

www.equineteurope.org

facebook.com/EquinetEurope

@equineteurope

Equinet
European network
of equality bodies

Equinet Secretariat
Rue Royale 138
1000 Brussels
Belgium

ISBN 978-92-95067-93-6